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SUPREME COURT OF THE UNITED STATES

October Term, 1958

Nos. 831

On Appeal from the Supreme Court of Michigan

FORD MOTOR COMPANY,
Defendant and Appellant,

vs.

ALEXANDER PARK, et al.,
Plaintiffs and Appellees,

THOMAS M. KAVANAGH, Attorney General,
Intervenor and Appellee,

THE APPEAL BOARD OF MICHIGAN EMPLOYMENT SECURITY COMMISSION and MICHIGAN EMPLOYMENT SECURITY COMMISSION,
Defendants and Appellees.

FORD MOTOR COMPANY,
Defendant and Appellant,

vs.

JOHN L. DORSEY, et al.,
Plaintiffs and Appellees,

THE APPEAL BOARD OF MICHIGAN EMPLOYMENT SECURITY COMMISSION and MICHIGAN EMPLOYMENT SECURITY COMMISSION,
Defendants and Appellees.

BRIEF OF THE ATTORNEY GENERAL OF MICHIGAN, ~~INTERVENOR~~ Appellee

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SPEAKER-HINES AND THOMAS, INC., LANSING, MICH.—1959

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BRIEF OF THE ATTORNEY GENERAL OF MICHIGAN, INTERVENOR.

I

The Attorney General of Michigan intervened in these proceedings involving the claims for unemployment benefits of respondent, Alexander Park, and some 5,700 claimants when they were pending before the appeal board. He has continued as intervenor because of the importance to

all of the people of the state of Michigan of judicial interpretation of the word "establishment" as used in section 29(1)(b)[1] of the Michigan employment security act.

Under Michigan law, the Attorney General of Michigan may intervene in any action at any stage of the proceedings in order to protect any right of the state or of the people of the state of Michigan by virtue of the following statute:[2]

> "• • • the attorney general • • • may, when in his own judgment the interests of the state require it, intervene in and appear for the people of this state in any other court or tribunal, in any cause or matter, civil or criminal, in which the people of this state may be a party or interested."

II

The brief of respondents Alexander Park, et al, and John L. Dorsey, et al, appellees, is adopted herein by reference. In addition we urge the following grounds in support of the motion to dismiss filed therein:

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[1]

"Sec. 29 (1) An individual shall be disqualified for benefits:

"• • •

"(b) For any week with respect to which his total or partial unemployment is due to a stoppage of work existing because of a labor dispute in the establishment in which he is or was last employed: • • •."

[2]

CL 1948 § 14.28; Henderson's Mich Stat Ann § 3.181.

1. **The Federal questions, if any, were not timely raised in the court below.**

Proceedings in the instant case were held before a hearing officer, an appeal board, and the Wayne county circuit court prior to being presented to the Michigan Supreme Court for decision.[3] Not until petitioner filed its brief with the Michigan Supreme Court did it raise the claim that federal questions might be involved herein. (See petitioner's appendix pp 36a - 37a). Appellant's reference to the fact that there might be federal questions involved was in the form of a suggestion that if the Chrysler organizational concept of establishment was not adopted by the Michigan Supreme Court to extend beyond state lines "serious question might arise as to the constitutional validity of the Michigan employment security act, particularly with respect to those provisions which purport to levy a tax upon interstate employers, whose integrated operations extend beyond the boundaries of the State of Michigan." This did not place the federal question squarely at issue before the Michigan Supreme Court.[4]

Following the Michigan Supreme Court's decision which was decided solely on state law, appellant attempted to raise federal issues by filing a petition for rehearing. The Michigan supreme court denied this petition without comment.

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[3]

Hearing and appeal procedures are set forth in Sections 32 - 38 of the Michigan employment security act.

[4]

Briefs and records before state courts are not ordinarily part of the record filed in the supreme court and cannot be used to establish that a federal question was raised.

Live Oak Assn. v. R.R. Comm., 269 U.S. 354;
Lynch et al v. N.Y. ex rel Pierson, 293 U.S. 52, 54.

Under Michigan law, constitutional issues will not be considered by the state supreme court unless raised in the lower court. See *City of Dearborn v. Village of Allen Park,* 348 Mich 449 where the Court stated:

> "It is also urged by plaintiffs that the action taken by the board of supervisors deprived Ford Motor Company and Detroit, Toledo and Ironton Railroad Company of their constitutional rights. We note that this issue was not raised in the lower court. It is now too late to raise this issue. See *Kellom v. City of Ecorse,* 329 Mich 303."

Ample opportunity exists under Michigan practice for a litigant to raise a constitutional issue in the trial court. In a previous case, involving the interpretation of the instant statute, the plaintiff specifically raised federal questions in the circuit court. The same were afterwards considered and rejected by the Michigan Supreme Court. See *Lawrence Baking Co. v. Unemp. C.C.,* 308 Mich 198 (cert denied 323 U.S. 738).

This Court has held that when the federal constitutional issue was not raised in the trial court as required by state law, but was raised for the first time in a petition for rehearing addressed to the state intermediate court, the highest state court's action in refusing without opinion to hear it, precludes review on certiorari by this Court. See *Stembridge v. Georgia,* 343 U.S. 541, p 547.

See also *Herndon v. Georgia,* 295 U.S. 441, 443, in which this Court stated:

> "The Federal question was never properly presented to the State Supreme Court unless upon motion for rehearing; and that the court then refused to con-

> sider it. The long established rule is that the attempt to raise a federal question after judgment comes too late, unless the court actually entertains the question and decides."

Since appellant did not raise the constitutional issues before the state trial court as is required by Michigan procedure, its attempt to raise them on rehearing came too late and should preclude review by this Court.

Appellant concedes the force of the above argument, but attempts to justify its right to raise the alleged federal grounds in the petition for rehearing of the Supreme Court decision by claiming that "No Federal right or claim of right of appellant had been infringed prior to the decision of the State Supreme Court." (14)[5] In other words, its failure to prevail before the Supreme Court on prior asserted grounds gave it the right to begin the litigation anew by raising federal grounds in a petition for rehearing. In support of this contention it cites the language of Justice Cardozo in *Great Northern R.R. Co. v. Sunburst Oil & Refining Co.*, 278 U.S. 358:

> "The rule, general as it is, does not • • • apply where the grounds of the decision supply a new and unexpected basis for a claim by the defeated party of the denial of a federal right."

We do not interpret Justice Cardozo's language to mean what appellant says it does. As we read his statement, Justice Cardozo meant that if the state decision results in a novel interpretation of law, which gives rise to federal

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[5] Page references are to Jurisdictional Statement, unless otherwise indicated.

issue, which could not have been anticipated at the beginning of the litigation, the appellant is entitled to raise the federal question for the first time in a petition for rehearing before the state court. In *Herndon v. Georgia, supra*, p 444, the Court stated:

> "Petitioner, however, contends that the present case falls within an exception to the rule — namely, that the question respecting the validity of the statute as applied by the lower court first arose from its unanticipated act in giving to the statute a new construction which threatened rights under the Constitution. There is no doubt that the federal claim was timely if the ruling of the state court could not have been anticipated and a petition for rehearing presented the first opportunity for raising it. Saunders v. Shaw, 244 U.S. 317, 320, 61 L. ed. 1163, 1165, 37 S. Ct. 638; Ohio ex rel. Bryant v. Akron Metropolitan Park Dist., 281 U.S. 74, 79, 74 L. ed. 710, 715, 50 S. Ct. 228, 66 A.L.R. 1460; Missouri ex rel. Missouri Ins. Co. v. Gehner, 281 U.S. 313, 320, 74 L. ed. 870, 875, 50 S. Ct. 326; Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 677, 678, 74 L. ed. 1107, 1111, 1112, 50 S. Ct. 451; American Surety Co. v. Baldwin, 287 U.S. 156, 164, 77 L. ed. 231, 236, 53 S. Ct. 98, 86 A.L.R. 298; Great Northern R. Co. v. Sunburst Oil & Ref. Co., 287 U.S. 358, 367, 77 L. ed. 360, 367, 53 S. Ct. 145, 85 A.L.R. 254. The whole point, therefore, is whether the ruling here assailed should have been anticipated."

The federal issues, if any, were present in this case from the beginning. They should have been raised by the appellant in the trial court as required by Michigan procedure. Appellant did not do so in reliance upon *Chrysler v. Smith*, 297 Mich 438 which it rashly anticipated would be followed by the Michigan Court and would be sufficient

to sustain its side of the case. However, there was no guarantee that Chrysler would be followed even by the trial court, where appellant should have raised federal issues, inasmuch as the question of whether the plants of an employer located in another state could be combined with other plants of the same employer located in Michigan so as to form "the establishment" set forth in Section 29 (1)(b) was a novel one which had never been passed upon by the Michigan Supreme Court. All the plants in Chrysler were located in the Detroit area within 11 miles of each other. Here the plant in which the strike occurred was located in Canton, Ohio (40). Under these circumstances, the trial court could have held that it was not bound by *Chrysler* and it could have ruled that the Canton, Ohio plant was not part of "the establishment" mentioned in Section 29(1)(b) of the Michigan employment security act.

Moreover, there was no certainty, that having prevailed in the trial court on the strength of Chrysler, Ford would again prevail in the State Supreme Court on the basis of that decision. Since, as we have stated, the outstate strike presented an issue of first impression in Michigan, the position which the Michigan Supreme Court would adopt was doubtful. And even if the factual situation in this case had been the same as that in *Chrysler*, the Michigan Supreme Court was still free to reverse its prior decision if it felt that it would subserve the ends of justice to do so.

Furthermore, eight of the nine states courts before whom the same questions had been litigated, had answered in the negative Ford's claim that the term "establishment" as used in the employment security acts encompassed Ford plants located in other states, for the

reason that the former cannot operate long without the latter (30). In none of these states did Ford seek appeal to this Court. Certainly, the fact that the weight of authority was so overwhelming against Ford's claims, should have given it reason to anticipate that the Michigan Court would overrule *Chrysler* and join the courts of her sister states in rejecting the "functional integration" theory for determining the extent of "the establishment" advocated by appellant.

It is true the "functional integration" doctrine propounded in *Chrysler* had been the law in Michigan for a period of 17 years. But the doctrine had not been challenged prior to the present decision. Even when issued *Chrysler* had been subjected to a powerful and vigorous dissent on the part of one of the participating judges, Justice McAllister, now serving with the Sixth Circuit Court of Appeals in Cincinnati. In this dissent he was joined by another judge, Justice Bushnell. The *Chrysler* case aroused a great deal of criticism because of its essential unfairness. The present Court held the doctrine established therein in so little esteem that even one of the dissenting judges was constrained to remark:

> "Were this a matter of first impression, I should find myself in agreement with Mr. Justice Edwards' interpretation of the word 'establishment.'" (72)

In view of the above, we contend that since petitioner had failed to avail itself of the opportunity to raise the constitutional issues in the trial court as required by Michigan practice, it should be precluded from raising them before this court.

2. The Michigan decision was based upon adequate non-Federal grounds.

The Court below ruled as a matter of law that the functional integration of a company's manufacturing plants located in Michigan and several other states does not make them a single "establishment" within the meaning of the Michigan employment security act (37). Ford had argued that the term "establishment" was intended by the legislature to include all the plants of Ford wherever located because they are "functionally integrated." This argument it claimed was supported by *Chrysler v. Smith, supra.* The Court rejected this contention. It overruled *Chrysler v. Smith* to the extent that it made functional integration the basic test in determining the extent of "the establishment" as used in the Michigan employment security act. By so ruling, it precluded the strike at the Canton, Ohio plant from consideration in determining the disqualification of the claimants herein, as provided by the Michigan employment security act in subsections 2, 3, and 4 of section 29(1)(b).

It is thus clear that what the lower Court did here was to construe a statute passed by the legislature of its state. In so doing it abandoned a former doctrine which it had advanced of its own accord in *Chrysler v. Smith.*

The decision was therefore based solely on adequate state grounds.

This Court has ruled that it will not review a state court decision where independent and adequate non-federal grounds of decision appear. See *Herb v. Pitcairn,* 324 U.S. 117, 125-126, where it was stated:

"This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds * * *. The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our jurisdiction. Our only power over state judgments is to correct them to the extent that they inaccurately adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we correct its views of federal laws, our review could amount to nothing more than an advisory opinion."

III

Appellant claims that this Court should assume jurisdiction in this case because substantial federal issues are involved. Its claim with reference to these issues may be summarized as follows:

1. Appellant is deprived of the equal protection of the laws because "the classification of employers, for the purpose of disqualification for unemployment benefits of employees whose stoppage of work was due to a labor dispute in which they were directly involved, on the basis of whether such employer's functionally integrated operations were all at one location or at different locations, is arbitrary and capricious and therefore invalid under the Equal Protection Clause" (19).

2. The statute, as interpreted, infringes the Commerce Clause by imposing an undue burden upon interstate

commerce, where, as here, the labor dispute occurs in a plant outside the state. (20)

In *Lawrence Baking Co. v. Unemp. C.C. supra,* the Michigan Supreme Court disposed of claims similar to those raised hereunder in the following language:

> "Plaintiff's argument is based upon the premise that the payment of compensation to employees on strike is a penalty upon the employer, because its rate of contribution to the unemployment fund will thereby be increased. The public purpose of the unemployment compensation law is to alleviate the distress of unemployment, and the payment of benefits is not conditioned upon the merits of the labor dispute causing unemployment. Likewise, the required contribution of the employer to the unemployment compensation fund is not determined upon the basis of the merits of the dispute. The increase in the amount of the employer's contribution to the fund because of its experience record of payments to employees is not in any sense a penalty. By the unemployment compensation act, the legislature provided a method of determining the employer's contribution to the compensation fund, and it did not see fit to base the amount of such contribution upon the merits of a labor dispute or upon the right or wrongdoing of the employer in connection with such dispute. Such legislative enactment is presumed to be constitutional unless the contrary clearly appears. In the case of Cady v. City of Detroit, 289 Mich. 499, 505, we said:
>
> " 'A statute will be presumed to be constitutional by the courts unless the contrary clearly appears; and in case of doubt every possible presumption not clearly inconsistent with the language and the subject matter is to be made in favor of the constitutionality

> of legislation. * * * Every reasonable presumption or intendment must be indulged in favor of the validity of an act, and it is only when invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution that a court will refuse to sustain its validity.' "

The present decision, we believe, presents a much fairer interpretation of the meaning of the term "establishment" than did *Chrysler*. It protects an unfortunate claimant who has been laid off through no fault of his own from being denied unemployment benefits because of circumstances beyond his control. At the same time it protects the employer from being made to pay exorbitant sums because of strikes, by retaining the disqualification provided for in subsections 2, 3, and 4 of section 29(1)(b) of the act. These provide that if a claimant is directly interested in, or involved in a labor dispute in the establishment in which he was last employed, he is disqualified from receiving benefits under the act. Furthermore, the present decision does not eliminate the factor of "functional integration" from being taken into consideration in the determination of what constitutes an "establishment" under the act. The present decision still retains this test as a factor, but other additional tests are set forth in Justice Edwards' opinion for determining what constitutes an "establishment" under the act (44-49).

In view of these observations, we contend that the present decision far from setting up arbitrary classifications provides for much more equitable and fair tests for determining disqualifications of claimants. It is more in harmony with the humanitarian purposes of the act as set forth in *Lawrence*.

Appellant's attempt to raise the issue of interstate commerce, we believe, is based chiefly upon its fear that "organized employees engaged in a common labor dispute are thereby enabled to finance such a dispute against a multiplant employer out of funds to which the employer must, as a result, pay higher contributions, by purposely striking any one of the key plants located outside the state of Michigan whose unemployment is due to a stoppage of work by reason of the strike at the key plant outside the state" (21).

The Supreme Court of Michigan foresaw this contingency and laid down the following policy to protect against its occurrence in *Lawrence Baking Co. v. Unempl. C.C.*, *supra*, p 213:

> "All interested parties who are involved in a claim for unemployment compensation • • • must be dealt with on an impartial basis. The unemployment compensation fund should never be used to finance claimants who are directly involved in a labor dispute, nor should it ever be denied to claimants who are legally entitled to receive benefits. • • • None of the money accumulated in this fund should ever be disbursed for the purpose of financing a labor dispute nor should it be illegally withheld for the purpose of enabling an employer to break a strike. The State of Michigan, in so far as this act is concerned, must remain neutral in all industrial controversies."

This still continues to be the avowed policy of the Michigan courts.

CONCLUSION

For the above reasons, we respectfully urge that this Court deny jurisdiction in this case by granting the motion to dismiss.

Respectfully submitted,

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